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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 438

WINSTON P. BOYER and GEORGE T. BOYER,
Appellants,

v.

RICHARD L. ELKINS and JAMES A. BULLOCK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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This Brief is filed in opposition to Appellees' Motion to Dismiss the Appeal.

The Appellants, Winston P. Boyer and George T. Boyer, hereinafter called the "Boyers," assert that the Colorado arrest statute and the Colorado body judgment statute violate the federal Constitution. The Appellees base their Motion to Dismiss the Appeal with respect to the arrest statute principally on two grounds: one, the decision of the Colorado Supreme Court rests on an ade-

quate non-federal ground and, two, that the constitutional issue was not timely raised nor was it considered by the Colorado court.

The Motion to Dismiss the Appeal with respect to the body judgment statute is predicated on the proposition that the appeal is premature because execution against the body of Winston P. Boyer has not been effected and may never be effected if he remains without the State of Colorado.

1. THE DECISION AND JUDGMENT OF THE COLORADO SUPREME COURT RESTS SOLELY ON A STATUTE REPUGNANT TO THE FEDERAL CONSTITUTION.

The Colorado arrest statute, Chapter 39, Article 2, Section 20, of the Colorado Revised Statutes, 1953, Permanent Supplement, provides:

> "Any provision of this chapter prior to the effective date of this section to the contrary notwithstanding, an arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed in his presence; and by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

This statute, it is submitted, violates the Fourth and Fourteenth Amendments to the United States Constitution because it permits an arrest for a misdemeanor not committed in the presence of the arresting officer. The Appellees claim that the arrest of the Boyers was made for crimes committed in their presence, and the decision of

the Colorado Supreme Court is therefore supported by non-federal grounds.

If the Colorado Supreme Court had delivered no opinion, or if the opinion rested on two grounds, one involving a federal question and the other not, then the Appellees' claim might have merit, *Lynch* vs *People of New York ex rel. Pierson*, 293 U. S. 52. But the Colorado Supreme Court did deliver an opinion and did rest the decision on only one ground — the arrest statute is lawful because a criminal offense had been committed before the arrival of the officers, and the officers had reason to believe that the Boyers committed it. Moreover, by its opinion, and in conformance with the ruling of the trial court, a jury has been precluded from determining if any offense had in fact been committed.

In its opinion, which is set forth in Appendix A to the Jurisdictional Statement, the Colorado Supreme Court quotes the statute, emphasizing the clause that provides: " . . . *and by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.*" (emphasis that of the Colorado Supreme Court, p. 26, Jurisdictional Statement) Then, in the language of the statute, the Colorado Supreme Court holds the arrests to be lawful:

> "We hold, under the facts disclosed by this record, that as a matter of law the defendants had committed a criminal offense or offenses, and that as a matter of law the plaintiffs had reasonable ground for believing that the defendants had committed such offense or offenses." (p. 27, Jurisdictional Statement)

The Colorado Supreme Court also noted that the arrests were made after the officers had a "five-minute conference with Harthun, who related what had happened." (p. 24 of Jurisdictional Statement)

Since the Colorado Supreme Court explicitly based its decision solely upon a ground repugnant to the federal Constitution, the United States Supreme Court should review the case, even though the state court might have based its decision on other adequate non-Federal grounds. *Steele vs. Louisville and Nashville R. Co.*, 323 U.S. 192, 197, n. 1; *Indiana ex rel Anderson vs. Brand*, 303 U.S. 95, 98; *International Steel Company vs. National Surety Company*, 297 U.S. 657, 666.

II. PROTECTION OF THE UNITED STATES CONSTITUTION WAS SEASONABLY INVOKED.

When a constitutional privilege has been denied for the first time by a ruling made on appeal, a litigant may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. This is true even though the petition for rehearing is summarily denied without reference to the federal question. *Missouri vs. Gehner*, 281 U.S. 313; *Brinkerhoff-Faris Trust and Savings Company vs. Hill*, 281 U.S. 673.

The Boyers' constitutional rights were denied for the first time when the Colorado Supreme Court ignored the issue before it and held as a matter of law that the arrests were lawful on the grounds that a crime had been committed by the Boyers outside the presence of the officers.

The Boyers' tendered instructions (R. 1274-1276),

particularly Instruction No. 8, which were refused by the trial court, instructed the jury to determine whether or not a crime had been committed in the presence of the officers. The Boyers urged before the Colorado Supreme Court that it was error not to give these instructions. The Colorado Supreme Court, instead of determining whether or not this issue of fact should have been presented to the jury, held that as a matter of law the arrests were lawful, not because a crime had been committed in the presence of the officers, but because a crime had been committed outside the presence of the officers and the arresting officers had reason to believe that the Boyers committed it. It was not until the Colorado Supreme Court applied the clause of the arrest statute, now challenged, that the constitutional issue arose.

The trial court ignored the issue of whether or not the arrests were lawful. The Boyers urged on appeal that their instructions concerning whether a crime had been committed in the presence of the officers should have been given. But the Colorado Supreme Court did not consider the part of the arrest statute that permits an officer to arrest "for a criminal offense committed in his presence," being the part upon which the Boyers' tendered instructions rest. When for the first time in the case the court held that the arrests were justified on a ground the Boyers assert is repugnant to the United States Constitution, they promptly raised their objection in the Petition for Rehearing. (App. B, Jurisdictional Statement)

It would have been premature to raise the constitutional issue, before the repugnant clause of the arrest statute was applied to the Boyers. As noted in the Appellees' Brief, "The best teaching of this Court's experi-

ence admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Poe vs. Ullman*, 367 U.S. 497, p. 503.

Appellees also urge that the claim of unconstitutionality was not made, pursuant to Rule 22 of the local rules of the trial court. Rule 22 is set out in the appendix to the Appellees' Brief. This rule provides that if a constitutional issue is raised prior to trial, notice must be given to the Attorney General. It is silent as to the procedure for raising constitutional issues after the trial, and, of course, being a rule of the trial court, has no bearing on raising constitutional issues before the Colorado Supreme Court. As held in *Mountain States Telephone & Telegraph Company vs. Animas Mosquito Control District*, 15 Colo. Ad. Sheets No. 13, p. 246, 380 P.2d 560 (1963), a constitutional issue may be raised and passed on for the first time by the Colorado Supreme Court, even though it is raised by the court itself and not urged or suggested by the parties before it.

> "Counsel for all parties urged that courts should consider only questions presented and the constitutionality of an act should be considered only at the instance of an aggrieved party.
>
> "Though generally it is not considered good practice for courts to resolve cases on grounds not urged by the parties or their counsel, yet in cases such as we have before us, when much of the argument revolves around which of two words and meanings the legislature intended, and which by either interpretation reveals legislation that is patently unconstitutional and void, and under which many persons are receiving unfair, discriminatory and unlawful treatment, it is

the duty of the courts to resolve the question to the end that the citizens may not be deprived of their constitutional rights. To ignore the question of the constitutionality would be to permit the perpetration of mischief spawned by this invalid provision for exclusion." id at 380 P.2d 562, 563.

III. THE BODY JUDGMENT STATUTE MAY BE CHALLENGED BY WINSTON P. BOYER BEFORE HE IS IMPRISONED.

As set forth in Appendix A to the Jurisdictional Statement, the trial court ordered that the plaintiffs have execution against the bodies of the defendants for a period not to exceed one year, or until further order of the court, or until the amount of the judgment has been paid. George Boyer has posted a surety bond in the amount of $35,000.00, to prevent such execution against him. Winston Boyer, however, has not posted such an appeal bond and execution may issue against him at any time, and, if he is found within the State of Colorado, he is subject to imprisonment for a year.

Winston Boyer should not have to wait until he is imprisoned in order to perfect his appeal. If this were the law, his imprisonment would be over long before a final determination was made on appeal, and, of course, the question would then be moot. Certainly, in a criminal proceeding, the defendant who is found guilty by the trial court need not be actually in the penitentiary before he can commence an appeal, and similarly a defendant in a civil action need not wait until he has paid the judgment before appealing.

This Court has previously granted certiorari to review the constitutionality of the New York body judgment statute, when it did not appear from the record that the appellant was in fact imprisoned, *Gotthilf vs. Sills*, 372 U.S. 957. (This writ was later dismissed when it was found that there was not a final determination by the New York courts, 375 U.S. 79).

CONCLUSION

It is submitted that the Appellees' Motion to Dismiss the Appeal should be denied, and that this Honorable Court should take jurisdiction and grant the appeal herein.

Respectfully submitted,

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